

103 FERC ¶ 61,332  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Sagebrush  
Euros ToyoWest Management LLC

Docket Nos. EG03-60-000  
EG03-61-000

DETERMINATION OF EXEMPT WHOLESALE GENERATOR STATUS  
AND INTERPRETATION OF SECTION 32 OF THE PUBLIC UTILITY HOLDING  
COMPANY ACT OF 1935, AS AMENDED

(Issued June 13, 2003)

1. On April 16, 2003, Sagebrush filed an application for determination of exempt wholesale generator (EWG) status pursuant to Section 32 of the Public Utility Holding Company Act of 1935, as amended by the Energy Policy Act of 1992 (PUHCA).<sup>1</sup> Additionally, Euros ToyoWest Management LLC (ETW) concurrently filed a request for EWG status as the operator of the 46-mile, 220-kV radial transmission line (Sagebrush Line) owned by the Sagebrush partnership. In this order we will grant both requests by Sagebrush and ETW (collectively, Applicants) for EWG status, as discussed below. Our determination will benefit customers by ensuring that applicants who qualify for EWG status under PUHCA will receive such status, as Congress intended.

2. Notices of the applications were published in the Federal Register, with comments or interventions due on or before May 13, 2003.<sup>2</sup> No comments were filed.

**Background**

3. Sagebrush owns the Sagebrush Line through which power generated by a number of wind-powered qualifying small power production facilities (QFs) located near Mojave, California (the Sagebrush QFs) is delivered to the utility power purchaser, Southern California Edison Company (SoCal Edison). An interest in the Sagebrush Line is dedicated to each of the Sagebrush QFs. The owners of the Sagebrush QFs (Sagebrush QF Owners)

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<sup>1</sup>15 U.S.C. § 79z-5a (2000).

<sup>2</sup>68 Fed. Reg. 22,690 (2003).

each own one or more special purpose companies (the Sagebrush Partners) that are the active partners in the Sagebrush Partnership. Sagebrush entered into an agreement (Management Agreement) with ETW whereby ETW manages the operations, servicing, maintenance and repairs of the Sagebrush Line that interconnects the Sagebrush QFs and the eligible facilities of Sagebrush EWGs with the transmission grid of Southern California Edison Company (SoCal Edison).

4. The Commission granted qualifying facility status to the Sagebrush QFs and the interests in the Sagebrush Line dedicated to the Sagebrush QFs in Gamma Mariah, et al., 44 FERC ¶ 61,442 (1988) (Gamma Mariah) and subsequent orders.<sup>3</sup> Sagebrush states that the Sagebrush Line is a component of multiple eligible facilities for purposes of Section 32 of PUHCA, because it constitutes interconnecting transmission facilities necessary to effect sales of electric energy at wholesale, is used exclusively to transmit power generated for sale at wholesale, and is sized to permit transmission of the output of facilities that generate such power. Sagebrush also relates that the ownership structure was chosen "for the purpose of administrative convenience and certain conditions of local law."<sup>4</sup>

5. Sagebrush is concurrently filing a Petition for Declaratory Order (Declaratory Order Request) seeking a Commission ruling with respect to the joint ownership and use of the Sagebrush Line by QFs and EWGs. The Sagebrush partnership states in its Declaratory Order Request<sup>5</sup> that the facilities of certain Sagebrush QF Owners, which currently also have EWG status (Sagebrush EWGs), may cease to be QFs and would retain only those regulatory exemptions created by EWG status.<sup>6</sup>

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<sup>3</sup>See, e.g., Zond Victory Garden Phase LV Development Corp., 57 FERC ¶ 62,018 (1991); Zond Sky River Development Corp., 57 FERC ¶ 62,019 (1991); Zond Systems, Inc., 41 FERC ¶ 62,079 (1987); Zond Windsystem Partners, Ltd. Series 85-A, 33 FERC ¶ 62,328 (1985); Zond Windsystem Partners, Ltd Series 85-B, 33 FERC ¶ 62,326 (1985).

<sup>4</sup>Application at 7-8, citing Gamma Mariah, 44 FERC at 62,398.

<sup>5</sup>In addition, Mojave 16/17/18 LLC (Mojave 16 Project), is filing an application for recertification as a qualifying small power production facility pursuant to 18 C.F.R. § 292.207(b) in Docket No. QF88-365-007 (Mojave 16 QF Recertification).

<sup>6</sup>Subject to, among other things, the Commission granting the Declaratory Order Request, the Mojave 16 QF Recertification and this Application, the Sagebrush Partnership Agreement will be amended to permit the continued use of the Sagebrush Line by the Sagebrush EWGs if they cease to be QFs.

6. Sagebrush, as the direct owner of the Sagebrush Line, asserts that under these circumstances it would no longer enjoy the exemption from PUHCA afforded to QF owners and operators pursuant to 18 C.F.R. § 292.602(b), and thus, it is requesting determination as an EWG pursuant to Section 32 of PUHCA and recent Commission precedent.<sup>7</sup>

### **Sagebrush's EWG Application**

7. Section 32(a)(1) of PUHCA defines an "exempt wholesale generator" as "any person determined by the Federal Energy Regulatory Commission to be engaged directly, or indirectly... , and exclusively in the business of owning and operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale." Section 32(a)(2) defines an "eligible facility" as a facility "used for the generation of electric energy exclusively for sale at wholesale" and expressly includes within the scope of an eligible facility "interconnecting transmission facilities necessary to effect a sale of electric energy at wholesale."

8. Sagebrush contends that the language of the statute allows an EWG to own only a portion of an eligible facility, and allows the portion to be limited to necessary interconnecting transmission facilities. Sagebrush further asserts that a recent Commission decision, Termoelectrica, supports the proposition that an entity is entitled to EWG status when its activities are limited to the ownership and/or operation of interconnecting transmission facilities included in an eligible facility.

9. Sagebrush also argues that Termoelectrica supports its claim that Sagebrush may be properly determined to sell electric energy at wholesale because sales by the Sagebrush EWGs should be imputed to the Sagebrush Partnerships.<sup>8</sup>

10. In addition, Sagebrush provides the following information in a sworn statement by a representative legally authorized to bind it required by Section 365.3 of the Commission's Regulations for a determination of EWG status:

(a) Sagebrush is engaged directly, or indirectly through one or more affiliates as defined in Section 2(a)(11)(B) of PUHCA, and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale as defined in Commission precedent interpreting

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<sup>7</sup>See Termoelectrica US., LLC and Termoelectrica de Mexicali, S. De R.L. de C.V., 102 FERC ¶ 61,019 (2003) (Termoelectrica).

<sup>8</sup>Termoelectrica, 102 FERC ¶ 61,019 at P 10-11.

Section 32(a)(1) of PUHCA. The Applicant is an affiliate, as defined in Section 2(a)(11)(B) of PUHCA, of the EWGs that own an interest in the Applicant.

- (b) Sagebrush will not make foreign sales of power at retail.
- (c) The circumstances described in Section 365.3(a)(1)(iii) do not apply to Sagebrush. Sagebrush owns the Sagebrush Line that interconnects the Sagebrush QFs and the eligible facilities of Sagebrush EWGs with the transmission grid of SoCal Edison. The Sagebrush Line is an eligible facility because it constitutes interconnecting transmission facilities necessary to effect sales of electric energy at wholesale, is used exclusively to transmit power generated for sale at wholesale, and is sized to permit transmission of the output of facilities that generate such power, as well as the output of possible future additional generating facilities.
- (d) There are no lease arrangements involving any of the eligible facilities of the Applicant involving any public utility company, or any leases where Applicant is lessor.
- (e) Florida Power and Light Company and Tokyo Electric Power Company are the only electric utility companies that are either an "affiliate" or an "associate company" of Sagebrush.<sup>9</sup>
- (f) The circumstances described in Section 365.3(b) do not apply to Sagebrush or its eligible facilities.

### **ETW's EWG Application**

11. ETW argues that it satisfies the requirements for EWG status because it is an operator of eligible facilities and is deemed to be engaged in sales of electric energy at

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<sup>9</sup>Prior to the transfer by Enron Corp. (Enron) of its interests in certain of the Sagebrush QF Owners (the Enron-related QFs) to a trust created for the benefit of creditors of two affiliates of Enron, as described in more detail in the Declaratory Order Request, Portland General Electric Company (PGE) was an associate company of the Applicant. Applicants state that, under the terms of the trust arrangement, Enron no longer owns, controls or holds power to vote the voting securities of the Enron-related QFs, and thus, PGE no longer is an associate company of Applicants.

wholesale on the basis of the relationship it has with entities selling electric energy at wholesale from eligible facilities.

12. ETW contends that it operates an "eligible facility" pursuant to a management agreement it has entered into with Sagebrush Partnership, the direct owner of the Sagebrush Line, as well as with each of the Sagebrush Partners.

13. ETW also claims that it can be deemed to be engaged in sales of electricity at wholesale because Commission regulations provide that a person engaged exclusively in operating all or part of one or more eligible facilities may be deemed to be engaged in selling electricity at wholesale by virtue of an agency relationship with a person or persons who sell electricity at wholesale from the eligible facility or facilities, and that its Management Agreement with the Sagebrush Partners satisfies that requirement.

14. Additionally, ETW provides the following information in a sworn statement by a representative legally authorized to bind it required by Section 365.3 of the Commission's Regulations for a determination of EWG status:

(a) ETW is engaged directly, or indirectly through one or more affiliates as defined in Section 2(a)(11)(B) of PUHCA, and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale as defined in Commission precedent interpreting Section 32(a)(I) of PUHCA.

(b) ETW will not make foreign sales of power at retail.

(c) ETW manages the operations, servicing, maintenance and repairs of the Sagebrush Line that interconnects the Sagebrush QFs and the eligible facilities of Sagebrush EWGs with the transmission grid of SoCal Edison. The Sagebrush Line is an eligible facility because it constitutes interconnecting transmission facilities necessary to effect sales of electric energy at wholesale, is used exclusively to transmit power generated for sale at wholesale, and is sized to permit transmission of the output of facilities that generate such power, as well as the output of possible future additional generating facilities.

(d) There are no lease arrangements involving any of the eligible facilities of ETW involving any public utility company, or any leases where ETW is lessor.

(e) Tokyo Electric Power Company is the only electric utility company that is either an "affiliate" or an "associate company" of ETW.

(f) The circumstances described in Section 365.3(b) do not apply to ETW or its eligible facilities.

## **Discussion**

15. We find that Sagebrush and ETW qualify for EWG status for the reasons explained in Termoelectrica.<sup>10</sup> Section 32(a)(2) states that the term "eligible facility" . . . includes interconnecting transmission facilities necessary to effect a sale of electric energy at wholesale.<sup>11</sup> Because the Sagebrush Line, like the interconnection line in Termoelectrica, falls within this definition, it is itself an "eligible facility" within the meaning of Section 32(a)(2) of PUHCA. Moreover, Section 32(a)(1) states that an entity may be an EWG if it owns "all or part of one or more eligible facilities."<sup>12</sup> Based on these specific facts we find that Sagebrush owns an "eligible facility," and ETW operates an "eligible facility."

16. The facts presented here are distinguishable from those in FPL New England Transmission, LLC,<sup>13</sup> where the Commission denied EWG status. The Sagebrush Line is a radial line that serves no purpose other than interconnecting the power generated for wholesale sales by its (indirect) owners, similar to the configuration in Termoelectrica, and there is no concern that the line will be used to provide service to third parties and to generate revenues from such service. In contrast, in FPLE NET, the facilities in question were not merely a radial transmission line connecting the generator to the grid, but encompassed all of the interconnection facilities within the Applicant's parent company's substation that tied together "three major 345 kV transmission lines in NEPOOL, including one of the major North-South wholesale transmission interfaces in New England."<sup>14</sup> The Commission noted that FPLE NET's facilities were an integral part of the wholesale transmission system in the area and that there was no information in the application indicating how much of FPLE NET's activity would be providing transmission service to the related generating facility and how much it would be providing to third parties. We have no such concerns here.

17. We also find, consistent with Termoelectrica, that Sagebrush may properly be determined to sell electric energy at wholesale, as required by Section 32(a)(1), notwithstanding that it will not directly engage in the sale of electric energy. In that order,

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<sup>10</sup>This order determines the EWG status of Sagebrush and ETW, but does not make any findings regarding the status of the Sagebrush EWGs. Such determinations would be beyond the scope of this proceeding.

<sup>11</sup>15 U.S.C. § 79z-5a(a)(2) (2000).

<sup>12</sup>15 U.S.C. § 79z-5a(a)(2) (2000) (emphasis added).

<sup>13</sup>FPL Energy New England Transmission, LLC, 103 FERC ¶ 61,194 (2003) (FPLE NET).

<sup>14</sup>FPLE NET, 103 FERC ¶ 61,194 at P 12.

we noted that we had previously ruled that an entity that simply operated an eligible facility could be deemed to engage in sales of electric energy at wholesale if it had an agency relationship with the person selling electric energy at wholesale from the facility.<sup>15</sup> The Commission stated that in a similar fashion, the generation facility owner's sales of electricity could be imputed to Termoelectrica. This was justified on the basis of the surrounding circumstances, *i.e.*, "the cross-border nature of this project, which makes it reasonable to have different entities owning different portions of the interconnection line." By the same reasoning, wholesale sales by a Sagebrush EWG may be imputed to the Sagebrush Partnership.

18. ETW has an agency relationship with the generation facility owners by virtue of its Management Agreement governing the operation and maintenance of the Sagebrush Line. This type of relationship can be the basis for imputing wholesale sales by the generation facility owners to ETW pursuant to Order No. 550-A. Accordingly, we find that ETW may be deemed to be engaged in sales of electricity at wholesale.

19. Although some interests in the Sagebrush Line transmit power generated by QFs that do not have EWG status, we find that this should not affect Sagebrush's and ETW's eligibility for EWG status. These QFs generate power for sale exclusively at wholesale and therefore satisfy the definition of an "eligible facility." The entirety of the Sagebrush Line therefore will be used to transmit electric energy from eligible facilities and thus is itself an eligible facility under Section 32(a)(2). Moreover, the Commission has granted EWG status to an applicant that operated a generating station partly owned by other entities, among other reasons, where it would be inefficient to have more than one entity be responsible for the entire station.<sup>16</sup> Hence, ownership and operation of interconnecting transmission facilities indirectly owned and used for wholesale sales by the non-EWG QFs is incidental to Sagebrush's and ETW's activities as EWGs.

### **Conclusion**

20. Based on the information contained in these applications, we determine that Sagebrush and ETW are EWGs as defined in Section 32(a)(1) of PUHCA. As required by Section 32(a)(1) of PUHCA, the Secretary is directed to notify the Securities and

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<sup>15</sup>See, *e.g.*, Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status; Order Addressing Motions for Rehearing, Reconsideration and Clarification; Amending Regulations; and Interpreting PUHCA Section 32(a)(1), FERC Stats. & Regs., Reg. Preambles ¶ 30,969 at 30,841-2 (1993) (Order 550-A).

<sup>16</sup>PP&L Montana, LLC, 88 FERC ¶ 61,281 (1999).

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Exchange Commission of this determination.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.